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No. 84-311

In the Supreme Court of the United States

OCTOBER TERM, 1984

DOMINIC ALBERT DEANGELIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in admitting co-conspirator statements into evidence at his trial.

1. Following a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846 (Count 1), and of possession with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count 2).[1] He was sentenced to concurrent

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[1]On May 19, 1983, petitioner, together with co-defendants Daniel and Donald Zavolta and Edward Chambers, was indicted for the above crimes. The Zavoltas were also charged with use of a telephone to facilitate the distribution of cocaine, in violation of 21 U.S.C. 843(b). On August 5, 1983, Donald Zavolta entered a plea of guilty to Count 2 (possession of cocaine with intent to distribute). The remaining defendants were convicted on all counts.

ten-year terms of imprisonment on each count. The court of appeals affirmed (Pet. App. 1-25).

The evidence is summarized in the opinion below (Pet. App. 2-9). In October 1982, Drug Enforcement Administration (DEA) agents in Louisville, Kentucky secured the cooperation of an individual named Shahram Bahadari to assist in various narcotic investigations. Working in this capacity, Bahadari learned from a bartender in Lexington, Kentucky that Donald Zavolta of Worthington, Ohio, was a cocaine distributor. Pet. App. 3-4. Based on this information, Bahadari telephoned Donald Zavolta in early May 1983 to arrange a cocaine purchase.

On May 8, 1983, Bahadari met with Zavolta and his brother in a Columbus, Ohio restaurant. Donald Zavolta indicated that he could supply large quantities of cocaine to Bahadari on a regular basis. Pet. App. 4. On May 13, 1983, Bahadari telephoned Donald Zavolta at his Worthington residence to determine whether Zavolta had obtained the cocaine. Zavolta stated that he had a pound of cocaine available for sale the next day at the price of $40,000.[2] The next day Bahadari and DEA agents drove to Worthington to purchase the cocaine from Donald Zavolta. DEA agent Kelly Snyder posed as a companion of Bahadari who was to finance the purchase. After arriving in Columbus, the agents rented several hotel rooms and enlisted the assistance of local police in maintaining surveillance of the Donald Zavolta residence. After checking into the hotel, Bahadari telephoned Donald Zavolta for directions. Zavolta advised Bahadari that he would visit Bahadari and his associate in their hotel room to complete the transaction. Telephone company records reflected numerous calls

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[2]This conversation was taped by Bahadari and introduced as evidence during trial. Pet. App. 5.

between Donald Zavolta and petitioner's residence early that same morning (Tr. 392). Pet. App. 4-6.

At approximately 4 p.m. that day, Donald Zavolta visited Bahadari and agent Snyder in their hotel room. After initial introductions, Bahadari and Zavolta decided to have dinner at a Pizza Hut restaurant while agent Snyder remained at the hotel with the money. Zavolta told Bahadari that the cocaine transaction would be completed at Zavolta's residence. He also advised Bahadari that there would be several people in his bedroom who would be there for the purpose of protecting his interests and that Bahadari should not be alarmed by their presence (Tr. 168-169).

While Bahadari and Donald Zavolta were at the Pizza Hut, agent Snyder received a phone call from Daniel Zavolta. After Snyder told him that his brother Donald was not in the room, Daniel Zavolta stated: "Everything is together. Have him call Danny." At approximately the same time that the phone call was received from Daniel Zavolta, Columbus police officers observed an automobile registered to co-defendant Edward Chambers parked next to the Donald Zavolta residence. Pet. App. 6-7.

Upon returning to the hotel, Donald Zavolta returned the call to his residence and talked with petitioner, who was at the Zavolta residence (Tr. 167, 601).[3] A minute or so into the conversation, Donald Zavolta told Bahadari and Snyder "Okay, we will do the deal in 15 minutes" (Tr. 168, 420, 421). Within minutes of this telephone conversation, Columbus police officers observed Chambers leave Donald Zavolta's residence and move his vehicle to a parking lot a short distance away. After parking the automobile, Chambers returned to the Zavolta residence. Pet. App. 7-8.

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[3]Testimony at trial established that petitioner was on the other end of the conversation (Tr. 601).

Bahadari, Snyder, and Donald Zavolta then drove to the Zavolta residence. Bahadari and Zavolta entered the apartment. Donald Zavolta went immediately to the second floor, where he conducted a conversation with persons then unknown (Tr. 171-173),[4] following which he returned with a pound of cocaine. Bahadari and Zavolta tested the cocaine for its purity. Bahadari went outside and informed the DEA agents that the cocaine was in the apartment. Pet. App. 8. Agents then entered to secure the apartment. Upon entering, DEA agents found petitioner and Chambers in the upstairs bedroom sitting on a bed (Tr. 371, 311). Donald and Daniel Zavolta were on the first floor of the apartment. Pet. App. 8-9.

A search of petitioner produced a vial of cocaine and a loaded ammunition clip for a handgun (Tr. 372). The weapon corresponding to the clip found in petitioner's possession was discovered under some clothes in the bedroom (Tr. 433, 435). See Pet. App. 9. A search of Chambers disclosed an empty shoulder holster and a knife, encased in a sheath, strapped to the small of his back. Another loaded handgun was found under the mattress upon which Chambers was sitting when the police entered the bedroom. Pet. App. 9.

After DEA agents secured a search warrant for the Donald Zavolta residence, additional firearms and ammunition were discovered in Chambers' briefcase and in the trunk of his automobile. A pound of cocaine was located in the kitchen oven, and various pieces of cocaine processing paraphernalia, including a grinder and cutting agents, were also discovered. Pet. App. 9-10.

b. Petitioner and co-defendant Chambers contended at trial that the statements made by the Zavolta brothers to Bahadari and the other DEA agents were hearsay and

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[4]Bahadari heard the voices, but could not identify them; nor could he discern the substance of the conversation. Tr. 173.

should not be admitted into evidence. The trial court conducted a lengthy hearing on the issue (Tr. 81-126) and concluded that sufficient evidence had been adduced to support the admissibility of the co-conspirator declarations under Fed. R. Evid. 801(d)(2)(E).

2. Petitioner challenges (Pet. 10-20) the district court's admission of his co-conspirators' statements.[5] In particular, he argues that the evidentiary predicate for the admission of such statements in the Sixth Circuit differs from the standard used by this Court and other courts of appeals. But since the court of appeals' stated rationale for admission of the statements was consistent with the prevailing standard, and the statements would clearly have been admissible under either test, there is no need for review by this Court.

Most courts of appeals that have addressed the issue admit co-conspirator statements into evidence only where there is a showing by a preponderance of the evidence independent of such statements (1) that a conspiracy existed; (2) that the declarant and the defendant against whom the statement is admitted were both members of the conspiracy; and (3) that the statement was made in furtherance of the conspiracy. See *United States* v. *Nardi*, 633 F.2d 972, 974 (1st Cir. 1980); *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970); *Government of the Virgin Islands* v. *Dowling*, 633 F.2d 660, 665 (3d Cir.), cert. denied, 449 U.S. 960 (1980); *United States* v. *Gresko*, 632 F.2d 1128, 1131 (4th Cir. 1980); *United States* v. *James*, 590 F.2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979); *United States* v. *Regilio*, 669 F.2d 1169, 1174 (7th Cir. 1981), cert. denied, 457 U.S. 1133 (1982); *United States* v. *Bell*, 573 F.2d 1040,

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[5]Petitioner does not identify the particular co-conspirator statements to which he objects.

1044 (8th Cir. 1978); *United States* v. *Petersen*, 611 F.2d 1313, 1327 (10th Cir. 1979), cert. denied, 447 U.S. 905 (1980).

In some cases, the Sixth Circuit has permitted the trial court to consider the co-conspirator statements themselves when making its determination. *United States* v. *Vinson*, 606 F.2d 149, 153 (1979), cert. denied, 444 U.S. 1074, 445 U.S. 904 (1980); *United States* v. *Arnott*, 704 F.2d 322 (1983), cert. denied, No. 82-2028 (Oct. 31, 1983). Those cases created at least the appearance of a conflict among the circuits. See *ibid.* (White, J., dissenting from denial of certiorari).

The court below, however, applied the prevailing legal standard rather than the *Vinson-Arnott* standard. The court expressly held that the trial court must find "that *independent* evidence supported the existence of the conspiracy by a preponderance" (Pet. App. 17 (emphasis added)) and observed that the trial court here "concluded that sufficient *independent* evidence had been adduced to support the prerequisite necessary for the application of [Rule] 801(d)(2)(E)" (*id.* at 17-18 (emphasis added)). Cf. *United States* v. *Nixon*, 418 U.S. 683, 701 & n.14 (1974). The decision below thus reflects, at most, a conflict *within* the Sixth Circuit; it does not conflict with the rule as followed elsewhere.

Moreover, as our recitation of the evidence in this case establishes (see pages 2-4, *supra*), there was sufficient independent evidence to establish the existence of the conspiracy under any standard. The government's principal witnesses, informant Bahadari and DEA agent Snyder, each testified in detail about the co-conspirators' activities and those of the petitioner. Telephone logs showed numerous calls between petitioner and the co-conspirators on the morning of the principal transaction; Donald Zavolta's telephone conversation with petitioner established his part

in the conspiracy; petitioner's presence at the Zavolta residence, armed and with cocaine, further established his link to the conspiracy; and the conversation with Donald Zavolta immediately before he returned downstairs with the cocaine provided further corroboration. Even without considering the co-conspirators' statements implicating petitioner in the scheme, the predicate for admission of the evidence was clearly made. Thus, even if the standard employed by the court below were inappropriate, the result would perforce remain the same.[6]

3. The second issue raised by petitioner (Pet. 16-20) concerns the standard of proof necessary to justify admission of a co-conspirator's out-of-court statement. However, as petitioner acknowledges (Pet. 20), the court of appeals employed the stricter, majority, standard (preponderance of the evidence), rather than the prima facie case standard. There is, therefore, no conflict in legal standards warranting this Court's attention.[7] Petitioner's suggestion that the court below merely paid "lip service" to the preponderance of the evidence standard, while in fact employing some lesser standard (Pet. 20), amounts to no more than a disagreement with the court of appeals' application of the standard to this set of facts.

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[6]It is also significant that Donald Zavolta testified for the defense at trial (Tr. 495-593). His testimony was inconsistent with the implications of his out-of-court statements; as the court of appeals observed (Pet. App. 10), "[t]he jury discredited Donald Zavolta's testimony."

[7]That a distinguished commentator may advocate yet a higher standard (beyond a reasonable doubt) (see Pet. 19-20) does not create a conflict in the circuits.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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